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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1304

A. Z. HANDSFORD,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No.

A. Z. HANDSFORD,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

A. Z. HANDSFORD, Defendant in the District Court and Appellant in the United States Court of Appeals for the Fifth Circuit, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case February 1, 1968, and adhered to on March 12, 1968 on Motion for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported. It is reproduced in Appendix A to this petition. The Court of Appeals did not render an opinion in denying Motion for Rehearing. Copy of the Order Denying Petition for Rehearing is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 1, 1968, (*infra*, Appendix C, p. 11). The timely Motion for Rehearing was denied March 12, 1968, (Appendix B, pp. 9-10). The judgment is final by its terms and denial of Rehearing, (Appendix C, pp. 10 - 11). The jurisdiction of this Court is revoked under the provisions of *28 U. S. CODE #1254 (1).*

The jurisdiction of the District Court was based on an indictment charging violations of Title 26 U.S.C., Sections 5205 (a) (2), 5604 (a).

QUESTIONS PRESENTED

1. Whether the Government's activities in electronically listening to and recording the petitioner's conversations and words, without his knowledge and consent, violated the privacy upon which he justifiably relied, while within the curtilage of his home, and thus constituted a search and seizure within the meaning of the Fourth Amendment, so as to render inadmissible testimony of such eavesdropping, and such evidence, having been admitted over objection, rendered his conviction erroneous.

CONSTITUTIONAL AND RULES PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Supreme Court Rule 19(b), in part, provides for the discretion of the Supreme Court to grant Certiorari "when a Court of Appeals * * * * * * has decided a federal question in a way in conflict with applicable decision of this Court."

CONCISE STATEMENT OF FACTS

A. TRIAL IN THE DISTRICT COURT.

Petitioner was indicted and tried in United States District Court for the Middle District of Georgia, Thomasville Division, acquitted on four counts, and convicted on two counts for liquor violations.

B. PERTINENT FACTS OF TRIAL IN DISTRICT COURT.

Government agents hired an undercover man, equipped him with a concealed electronic eavesdropping device, and sent him without a warrant and without the knowledge and consent of petitioner to the house of petitioner to purchase illegal whiskey. Conversations there had were heard at a distance by the Governments Agents over the electronic eavesdropping device. Upon trial there was admitted, over objection of petitioner, testimony of the Government

Agents as to the text of such conversations. Conviction resulted.

C. THE APPEAL.

Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit. The said Court of Appeals, by a two to one decision, approved the conviction, and denied Rehearing. (Appendix A and Appendix B.)

REASON FOR GRANTING THE WRIT

When the case sub judice came before the Circuit Court of Appeals for the Fifth Circuit it was decided under the ruling of the Court of Appeals for the Fifth Circuit in *Dancy vs. United States,* 5 Cir., 1968, _____ F.2d_____(No. 24611) Appendix F infra. pp. 15-22)

The position taken by the Government in its brief and argument before such Court was reliance upon the ruling announced in *On Lee vs. United States, 343 U. S. 747.*

Petitioner in his brief relied largely upon the rulings of this Court in *Silverman vs. United States,* 365 U.S. 505.

While this case was on Appeal, *Katz vs. United States,* _____, U. S. _____, 88 Sup Ct 507, was decided. Petitioner also relied upon Katz.

The Fifth Circuit divided in its opinion. The majority

followed its ruling in Dancy vs. U. S., 5 Cir. _____ F.2d _____, 1968, (No. 24611—infra Appendix F.) which cited

Osborne vs. United States, 385 U. S. 323,
Hoffa vs. United States, 385 U.S. 293,
Lewis vs. United States, 385 U.S. 206,
Lopez vs. United States, 427 U.S. 427, and
On Lee vs. United States, 343 U.S. 747.

The minority distinguished the cases of this Court above cited and followed Katz as controlling.

The Circuit Court of Appeals for the Fifth Circuit has begun a line of decisions in Dancy followed by the instant case, which are in conflict with this Court's applicable ruling in Katz. Such error should not be perpetuated, but corrected, as a matter of public importance.

CONCLUSION

For the reasons stated it is respectfully submitted that this Petition for Certiorari should be granted.

Andrew Jackson Whitehurst, III, and

Edwin A. Carlisle

Edwin A. Carlisle
Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I do hereby certify that on the 28th day of March, 1968, I mailed a true and correct copy of the foregoing petition for certiorari with appendices to Mr. Floyd M. Buford, United States Attorney, Federal Building, Macon, Georgia 31200, by placing same in a properly addressed envelope with sufficient postage thereon and deposited same in the United States Mail.

Andrew Jackson Whitehurst, III
Post Office Drawer 47
Thomasville, Georgia 31792
Attorney for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,311

A. Z. HANDSFORD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(February 1, 1968.)

Before BROWN, Chief Judge, FAHY* and DYER, Circuit Judges.

PER CURIAM: Appellant was convicted in the Court below on two counts of a six-count indictment. The counts under which Appellant was found guilty charged him with possessing and selling distilled spirits with-

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*Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

out, having the proper tax stamp affixed thereto, in violation of 26 U.S.C.A. §5205(a)(2), 5604(a). The sole issue presented here is whether the conviction must be reversed because of the admission into evidence of the testimony of federal agents who testified to conversations of the defendant overheard by them through the use of an electronic transmitter concealed on the body of an undercover informer.

The facts show that the undercover agent, McCullough, went to Appellant's house to buy illegal whiskey while other agents remained hidden outside the house watching the events and listening to the conversation over an electronic transmitter planted on McCullough's body. McCullough's testimony concerning the sale of the whiskey by Handsford and the conversation surrounding that sale was fully corroborated by the three agents who had listened to (but not recorded) the conversation. Appellant contends that the testimony of the agents was introduced in violation of the Fourth Amendment as it constituted an unreasonable search and seizure.

To the extent that Appellant objects to the testimony of McCullough, the informer, concerning conversations between himself and Appellant which took place in Handsford's home and to which McCullough was a human, not an electronic, listener, this case is controlled by *Lewis v. United States,* 1966, . . . U.S. . . ., 87 S.Ct. . . ., 17 L.ed 2d 312. In that case the Court held that when a home is converted into a commercial center where outsiders are invited in to transact business, it loses it broad range of constitutional protections. As

to the corroboration coming from the electronic transmitting device and the opportunity it afforded for additional "listeners," this case falls before our opinion rendered this day in *Dancy v. United States*, 5 Cir., 1968, . . . F. 2d . . .. [No. 24611, ... , ..., 1968] and the cases cited therein.

AFFIRMED.

FAHY, Circuit Judge, dissenting:

I would reverse for reasons similar to those stated in my dissent in *Dancy v. United States*, decided this day.

APPENDIX "B"

Filed: Mar. 12, 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,311

A. Z. HANDSFORD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the Middle District of Georgia

(March 12, 1968)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, FAHY* and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

*Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24311

D. C. Docket No. Cr. 1166

A. Z. HANDSFORD,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, Chief Judge, FAHY* and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

FAHY, Circuit Judge, dissents.

February 1, 1968

Issued as Mandate: March 20, 1968

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*Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

APPENDIX "D"

JUDGMENT AND COMMITMENT

United States District Court for the
Middle District of Georgia
Thomasville Division

United States of America
v. No. 1166
A. Z. Handsford

On this 1st day of December, 1966 came the attorney for the government and the defendant appeared in person and, by Counsel (employed)

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] Not Guilty and a verdict of guilty of the offense of 26 USCA, 5205(a)(2), 5604(a) possessed and sold non-tax paid whiskey as charged[3] in Counts 3 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 4 FOUR (4) YEARS on each of Counts 3 and 4, service of said sentences to run concurrently from this

date, or until he is otherwise discharged as provided by law.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant. At Thomasville, Georgia

(Signed) J. ROBERT ELLIOTT,
United States District Judge.

APPENDIX "E"

The Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 19 SUPREME COURT RULES

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of

right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

APPENDIX "F"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24611

JOHNNY DANCY, JR.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 1, 1968.)

Before BROWN, Chief Judge, FAHY* and DYER, Circuit Judges.

BROWN, Chief Judge: Appellant Dancy was convicted under a two count indictment charging him with dispensing and distributing a narcotic drug not in the original stamped package in violation of 26 U.S.C.A.

*Senior Circuit Judge of the District of Columbia, sitting by designation.

§4704 (1967) and with selling, bartering, or giving away a narcotic drug not pursuant to a written order in violation of 26 U.S.C.A. §4705 (1967). Appellant contends that the trial court committed reversible error in allowing a government agent to testify about a conversation between appellant and a third person which the agent overheard through the use of an electronic transmitter hidden on that third person.[1] We affirm.

The facts of the case may be briefly stated. Government Agent Seibert and an informer, Emmet Gantt, drove together to an apartment house. Gantt was outfitted with an electronic transmitter, given twenty dollars, and sent into the apartment building. He was admitted into one of the apartments by an unidentified man. Gantt woke up appellant and engaged him in conversation concerning the purchase of narcotics. Gantt purchased some narcotics from appellant and injected part of them into his body at that time. He returned to Agent Seibert without the money but with one capsule of heroin. The conversation between Gantt and appellant was overheard by Seibert through the electronic receiver and transmitter. At appellant's trial, Gantt and Seibert both testified to the conversation. Appellant's counsel objected to Seibert's testimony (but not that of Gantt) contending

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[1]Appellant also charges error by the trial judge in allowing the government agent to remain in the courtroom after the Rule (F. R. Crim. P. 30) had been invoked. This action is within the sound discretion of the trial judge and no abuse of that discretion is shown here. See Del Cristo v. United States, 5 Cir., 1964, 327 F.2d 208; Portomene v. United States, 5 Cir., 1955, 221 F.2d 582; Bostwick v. United States, 5 Cir., 1955, 218 F.2d 790.

that the evidence, if admitted, would result in a violation of appellant's constitutional rights under the Fourth Amendment. The trial judge first excluded, but then admitted the testimony.

There is no merit to the contention that this constituted reversible error. The testimony of Gantt as to the conversation with appellant in the apartment to which Gantt was lawfully admitted was clearly admissible. See *Hoffa v. United States*, 1966, 385 U.S. 293, 87 S.Ct. 408, 17 L.ed 2d 374; *Lewis v. United States*, 1966, 385 U.S. 206, 87 S.Ct. 424, 17 L.ed 2d 312. And it remains the law that testimony regarding the content of conversations between informers and suspects overheard by government agents by the use of electronic devices under circumstances such as those in this case are admissible into evidence. See *Osborn v. United States*, 1966, 385 U.S. 323, 87 S.Ct. 429, 17 L.ed 2d 394; *Lopez v. United States, 1963*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.ed 2d 462; *On Lee v. United States*, 1952, 343 U.S. 747, 72 S.Ct. 967, 96 L.ed 1270; *Long v. United States*, 5 Cir., 1967, . . . F.2d . . . [No. 24224, Nov. 10, 1967]; *Beatty v. United States*, 5 Cir., 377 F.2d 181, *rev'd. on other grounds*, 1967, ... U.S. . . . ., 88 S.Ct. . . . ., 19 L.ed 2d 48; *Hurst v. United States*, 5 Cir., 1967, 370 F.2d 161.

These cases are undisturbed by the Supreme Court's very recent decision in *Katz v. United States*, 1967, . . . U.S., ... , 88 S.Ct. . . . . , 19 L.ed 2d . . . . . [No. 35, Dec. 18, 1967, 36 L.W. 4080], where the Court held it to be an unreasonable search and seizure for federal agents by means of an external (non-wiretapping) electronic device to listen to and record the defend-

ant's end of telephone conversations made from a public booth. Indeed, the Court specifically expressed continued approval of the principle that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210 [87 S.Ct. ....., 17 L.ed 2d 312]." *Katz v. United States, supra,* ..... U.S. at ....., 88 S.Ct. at ....., 19 L.ed 2d at ..... [36 L.W. at 4081]. The present case presents an entirely different situation from the one in *Katz* and that decision does not require a different result from that reached by the trial judge. See *Katz v. United States, supra,* . . . U.S. at ....., 88 S.Ct. at ....., 19 L.ed 2d at ..... (opinion of White, J., concurring).

AFFIRMED.

FAHY, Circuit Judge, dissenting:

Since this case was submitted on appeal the Supreme Court has decided *Katz v. United States,* ..... U.S. ..... The Court held that the electronic eavesdropping engaged in there was a search subject to the requirements of the Fourth Amendment for its validity. Since those requirements had not been satisfied, though the Court indicated they could have been, the evidence obtained by the search was held to be inadmissible. Under this ruling I think the testimony of Seibert was inadmissible in this case.

In *Osborn v. United States,* 385 U.S. 323, relied upon by the court, there was prior judicial approval of the challenged recording; and in *Hoffa v. United States,*

385 U.S. 293, and *Lewis v. United States*, 385 U.S. 206, also relied upon, neither recordings nor transmissions were involved. The challenged testimony were statements of government informers which had been made directly to them or in their presence. None of these cases seem to me to be apposite to appellant's case.

Lopez v. United States, 373 U.S. 427, is more nearly in point but it too has features, emphasized in both the majority opinion of Mr. Justice Harlan and the concurring opinion of the Chief Justice, which distinguish it from the present case. In *Lopez* a concealed instrument on the person of an undercover agent recorded a conversation between him and the defendant. Admission in evidence of the recording itself to corroborate the testimony of the undercover agent was upheld in the circumstances of the case. In so ruling the Court referred to the decisions in which it had "sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, *e.g.*, *Olmstead v. United States*, 277 U.S. 438; *Goldman v. United States*, 316 U.S. 129." 373 U.S. at 438.

In *Katz*, however, the Court "conclude[d] that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." Those decisions were expressly overruled. Moreover, the *Katz* case, as shall be seen,

factually resembles ours more closely than it resembles *Lopez*.

The court also cites, and the government relies upon, *On Lee v. United States*, 343 U.S. 747. The Court in *Lopez* referred to *On Lee*, but only to point out that *On Lee* did not help Lopez. Reliance was not placed upon *On Lee*, and the Chief Justice was careful in his concurring opinion to make plain that he could not join in any implication that the majority was accepting the continued vitality of *On Lee*. In any event the problem we have is whether the Supreme Court's more recent decision in *Katz* governs the present case. Except for *Katz* I think we would be bound by *On Lee*.[1] With *Katz* supervening I cannot think we are bound.

In *On Lee* an electronic device concealed on the person of an undercover agent transmitted two conversations between the agent and the defendant, one of which took place in the defendant's laundry establishment and the other a few days later on the street. On each occasion the transmitted conversation was heard by a government agent stationed nearby with a receiving device. This agent's testimony as to what he had heard was held admissible. In *Katz* an electronic de-

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[1]It might be thought that we should be bound also by *Lopez*; but I think that case stands apart now on the basis of the special reasons set forth in the majority and concurring opinions. While the Court did not accept the views of the dissenting opinion of Mr. Justice Brennan that the recording was in reality the same as a third person, there is the factual difference between *Lopez* and *Katz* that in the latter the excluded evidence was the testimony of a third person rather than, as in *Lopez*, a recording on an instrument attached to the person to whom the defendant spoke.

vice concealed in the top of a public telephone booth transmitted to nearby government agents words spoken by defendant over the telephone to a person in another state. The agents' testimony as to what they heard in this manner was held inadmissible.

In neither *On Lee* nor *Katz* was the challenged testimony in corroboration of the testimony of the person to whom the defendant was actually speaking, the situation in *Lopez*. The result is that the only arguably relevant factual differences between *On Lee* and *Katz* were the location of the electronic transmitter and the fact that in *On Lee* the person to whom the defendant spoke was a government agent whereas in *Katz* he was not. The Supreme Court held in *On Lee* that there was no "unlawful search and seizure such as is proscribed by the Fourth Amendment," and said "no trespass was committed." 343 U.S. at 751. In *Katz* the Court held that "the Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." As to the absence of a trespass in *Katz* the Court stated, "we have expressly held that the Fourth Amendment . . . . extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman v. United States*, 365 U.S. 505, 511."

The testimony by Seibert in the present case, like the testimony in *Katz*, was the fruit of an intrusion upon a conversation by an uninvited ear by means of

electronic devices. The conversations in both cases were otherwise private. In our case the conversation took place in a private apartment. Appellant's words were intended to be heard only by the informer, as the words of defendant in *Katz* were intended to be heard only by the person at the receiving end of the telephone.[2] Seibert could not have heard the conversation except for his intrusion from outside through the electronic instruments. As in both *On Lee* and *Katz* the reception of the transmitted conversation was entirely external to the place occupied by the defendant when he spoke.

I am unable to draw a constitutional distinction between the present case and *Katz*. For this reason I follow *Katz* as the holding of the Supreme Court applicable to this case. Accordingly I think the admission of the Seibert testimony was error, as it was the fruit of a search and seizure which were not made in conformity with the provisions of the Fourth Amendment.

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[2]Not involved is a listening in on an extension of a telephone line. See *Rathbun v. United States*, 355 U.S. 107.

BRIEF IN OPPOSI-
TION TO PETITION
FOR A WRIT OF
CERTIORARI

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A. Z. HANDSFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

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Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1304

A. Z. HANDSFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1968. A petition for rehearing was denied on March 12, 1968. The petition for a writ of certiorari was filed on April 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether conversations overheard by the use of a radio transmitter secreted on an informer with his consent were properly admitted in evidence to corroborate the informer's testimony.

STATEMENT

A seven-count indictment charged petitioner and three others with possessing, selling, and transporting untaxed liquor. Petitioner, named in six counts, was convicted on two, based on a transaction of March 3, 1966. On December 1, 1966, he was sentenced to imprisonment for four years. The court of appeals affirmed (Pet. App. "A").

The evidence showed that Walter McCullough, a special employee of the Alcohol and Tax Division, negotiated for the purchase of various quantities of "moonshine" whiskey from petitioner. On the first occasion, January 7, 1966, delivery was made at petitioner's house in Bainbridge, Georgia, by petitioner's sister-in-law, Mrs. Oddie Rae Killings (R. 13-16).[1] On March 2, 1966, McCullough, equipped with a hidden radio transmitting device, again went to petitioner's home to purchase liquor. Federal agents, listening to a receiver, heard petitioner ask how much McCullough wanted. McCullough replied, "I'll take 25." Petitioner stated that he did not have that amount

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[1] Co-defendant Oddie Rae Killings, named in four counts, was convicted on two counts. Co-defendant Clifford Hill was convicted on all three counts, and co-defendant Fennison Gardner was acquitted on the lone count in which he was named.

available. He told McCullough, "Check with me, back with me tomorrow between 3 and 4 p.m." (R. 70).

When McCullough returned the following day, petitioner was not at home. The special employee, once more carrying a hidden transmitter, was greeted by Mrs. Killings, who stated that petitioner had no liquor and that she did not know when he would have any (R. 19). McCullough left and returned at about 4:30 p.m. (R. 72, 98, 128, 148). McCullough told petitioner that he would buy twenty-five gallons if he could get a desirable price. Petitioner replied, "Well, I guess you think I'm making my liquor but I'm buying it, and I'm paying 20 for it and I have to get 30 for it." (R. 19, 74, 98, 128, 148). McCullough agreed to that price and permitted petitioner to use his car (R. 74). Petitioner drove away and returned fifteen minutes later with twenty-four gallons of untaxed liquor in the rear of the vehicle (R. 19). He sent Oddie Rae Killings to her house to secure another gallon (R. 74).

ARGUMENT

Petitioner contends that under *Katz* v. *United States*, 389 U.S. 347, it was error to admit the evidence of the monitored statements which corroborated the earlier testimony of the informer. This Court has recently declined to consider that same issue in two cases. *Fountain* v. *United States*, 384 F.2d 624 (C.A. 5), certiorari denied, April 1, 1968 (No. 1109 this Term); *Long* v. *United States*, 387 F.2d 377 (C.A. 5), certiorari denied, March 4, 1968 (No. 1001, this Term). There is no occasion to do so in

this case. As noted in the briefs in opposition in the above-cited cases, this Court held in *Lopez* v. *United States*, 373 U.S. 427, that when one voluntarily speaks to another he assumes the risk that the auditor may repeat the contents of the communication to others, and that the communication may "be accurately reproduced in court, whether by faultless memory or mechanical recording." 373 U.S. at 439. The ruling in *Lopez* has been undisturbed by *Katz* v. *United States*, 389 U.S. 347, which held that prior judicial authorization was required when neither party had consented to the monitoring. Reliance on *Katz* is clearly misplaced where, as here, one party to the conversation has given his consent to the monitoring (see the concurring opinion of Mr. Justice White, 389 U.S. 362, 363).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

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